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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR J. CROMARTY, and THOMAS J. HARWOOD, Constituting the Board of Supervisors of Suffolk County, New York

Appellants,

v.

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS

Appellees.

On Appeal from the District Court of the United States for the Eastern District of New York

JURISDICTIONAL STATEMENT

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I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS

Appellees.

On Appeal from the District Court of the United States for the Eastern District of New York

JURISDICTIONAL STATEMENT

This is an appeal by Evans K. Griffing, *et al* from an Opinion and Order of February 1, 1965 issued by the District Court for the Eastern District of New York sitting as a three-judge statutory Court especially invoked by the provisions of 28 U.S.C. section 2281. This Statement is submitted by Appellants to

show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The Opinion of the District Court of the United States for the Eastern District of New York is reported at 238 F.Supp. 997, and is attached to this Statement as Appendix A, *infra* at page 1a. The Order of the District Court is attached to this Statement as Appendix B, *infra* at page 15a. The Opinion of the District Court (Bruchhausen, J.) is reported at 217 F.Supp. 166 and is attached to this Statement as Appendix C, *infra* at page 17a.

JURISDICTION

This suit was brought under 42 U.S.C. sections 1983 and 1988; under 28 U.S.C. sections 1343(3) and 1343 (4); and under 28 U.S.C. Sections 2201-2202 seeking a declaratory judgment as well as injunctive relief to restrain Appellants as duly elected members of the Board of Supervisors of Suffolk County, State of New York, from exercising any county function or power on the general grounds that the Charter, approved by the electorate January 6, 1958, and the County Law, were unconstitutional. The three-judge District Court was ordered by Judge Bruchhausen September 20, 1963. On February 1, 1965, the three-judge Court issued its Opinion. On March 3, 1965, the three-judge Court issued its Order. Notice of Appeal to this Court was filed April 2, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. section 1253. The following representative cases sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

Reynolds v. *Sims,* 377 U.S. 533, 12 L.Ed 2d 506, 84 S. Ct. 1362; *Lucas* v. *Colorado General Assembly,* 377 U.S. 713, 12 L.Ed. 2d 632, 84 S. Ct. 1472; *Roman* v. *Sincock,* 377 U.S. 695, 12 L.Ed 2d 620, 84 S. Ct. 1462; *Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656, 12 L.Ed 2d 595, 84 S. Ct., 1442; *WMCA, Inc.* v. *Lomenzo,* 377 U.S. 633, 12 L.Ed 2d 568, 84 S. Ct. 1418; *Davis* v. *Mann,* 377 U.S. 678, 12 L.Ed 2d 609, 84 S. Ct. 1453.

STATEMENT OF THE CASE

The issues on the merits raised in this appeal are of far-reaching importance to every local subdivision of state, county and municipal government throughout the United States.

The proceeding below was first brought under the statutes cited above by two residents of the Towns of Brookhaven and Huntington, County of Suffolk, State of New York, allegedly on behalf of themselves and all other taxpayers and voters of the said county in the said state against the ten Appellants here, who individually are the supervisors of the ten towns from which they are elected and collectively comprise the Board of Supervisors of Suffolk County, which is the governing body of the county. The complaint charged, among other things, that the Suffolk County Charter, overwhelmingly approved by the voters on January 6, 1958, as well as the County Law of the State of New York, were unconstitutional because (1) votes cast by supervisors in their function as the county governing body did not fairly reflect population proportion in the county, and (2) the votes of the inhabitants of the more populated areas of the towns are not accorded equal weight as compared to those of the repre-

sentatives from the less populated towns. The complaint alleged further that upon the basis of the undisputed facts the constitution of the present legislative body for the county is not representative of the voters of the county under the Fourteenth Amendment to the Constitution of the United States. Appellants first filed a motion to dismiss the complaint on the ground, among others, that there was no substantial federal question involved in the manner of electing local officials at the town and county level. The U.S. District Court for the Eastern District of New York in *Bianchi* v. *Griffing,* (217 F.Supp. 166, 1963) denied Appellants' motion without prejudice to renewal before a three-judge U.S. District Court. Such a Court was convened, and after a motion to dismiss was heard and filed, on February 1, 1965, an Opinion adverse to both parties was rendered. Appellants' motion to dismiss the complaint and an injunction prayed by the Appellees, Plaintiffs below, were denied and no relief to either side is evident in the Opinion of the three-judge District Court from which this appeal has been noted. The Court retained jurisdiction.

Appellants contended, *inter alia,* as they contend in this appeal, that there is no substantial federal question; indeed, Appellants are in the anomalous position of asking the Supreme Court to note probable jurisdiction for the purpose of urging upon the Supreme Court that it overrule the judgment rendered by the three-judge Federal Court in that the three-judge Federal Court erroneously saw a substantial federal question where none existed.

THE QUESTIONS BEFORE THE SUPREME COURT ARE SUBSTANTIAL

Appellants must first discuss the question of the Supreme Court's jurisdiction on this appeal.

Whether or not the Supreme Court may take jurisdiction of a case solely for the purpose of correcting a jurisdictional error of the lower court seems to be well settled by *United States* v. *Corrick,* 298 U.S. 435 (1936). This case held that in an appeal from a three-judge District Court the Supreme Court would have jurisdiction for this limited purpose. Subsequent citations of the *Corrick* rule by the Court have not altered or diminished the holding. *Eichholz* v. *Public Service Commission of the State of Missouri,* 306 U.S. 268 (1939); *Mayo* v. *Lakeland,* 309 U.S. 310, (1940); *Magnolia Petroleum Co., et al* v. *Thompson,* 106 F.2d 217 (1939). *Corrick* is distinguishable from this case in that the lower court there had in fact enjoined the Appellants from performing certain acts; thus in *Corrick* there was no question but the Appellant was an "aggrieved" party and that the lower court's order was final and appealable.

We now face the problem as to whether or not the decision in this case, where there has been no injunction ordered and where Appellants' motion to dismiss on the ground of the lack of federal jurisdiction was denied, constitutes the kind of order which under section 1253 would permit appeal. In general, the rules provide that Appellant must be both "aggrieved" and subject to a "final" order. The Supreme Court has held that the right to review on a question of jurisdiction is subject to prior "final" judgment. *Toledo Railways and Light Co.* v. *Hill,* 244 U.S. 49 (1917). The Court further has held that a judgment is final

for purposes of appeal when it terminates the litigation between the parties on the merits of the case and leaves to be done only the enforcement by execution of what has been determined by the Court. *Parr* v. *United States*, 351 U.S. 513 (1956). Appellants are "aggrieved" inasmuch as they did not secure the full relief sought before the three-judge District Court, that is, a disposition of the case on its merits. On the other hand, it seems equally clear that the Opinion of the three-judge District Court is not the type of final order that is generally appealable.

Obviously, neither party secured the relief it sought. The Court took and retained jurisdiction and issued an Opinion in which it fairly can be said to have adopted the view that it intends to stand by and wait for instructions from its superiors on the bench, or hopefully that the appropriate state and county agencies will correct the situation. Since the legal rationale behind the requirement that an appealable order be a final one is to avoid piecemeal litigation, it follows that the appropriate time to litigate the questions on their merits would be such time as the three-judge District Court is moved again to render a judgment on the merits. However, we contend that our appeal lies under section 1253, if that statute is not regarded merely as having created an expeditious appeal procedure which circumvents the Courts of Appeal, but instead is regarded as having created a new legal right to appeal that is not governed by the usually applied principles of appealability discussed above. Thus we could say that the Supreme Court by virtue of its appellate jurisdiction under this specific statute has jurisdiction to determine whether the court below had before it a question of substantial federal nature or other concomitant jurisdiction. *Phillips* v. *United*

States, 312 U.S. 246 (1941); *ILGWU* v. *Donnelly Garment Co.,* 304 U.S. 243 (1938). Thus we find support for the proposition that the three-judge District Court's statutory language means that *any* party, "aggrieved" or not, may appeal from an order or decision whether such order or decision is "final" or not. This specific reasoning is supported in *Eichholz* v. *Public Service Commission,* 306 U.S. 268 (1939). In that case the Supreme Court, acknowledging that the decree below as not final because of the pendency of a counterclaim, still retained jurisdiction because the statute expressly authorized a direct appeal to it from an order granting or denying an injunction and there was such an order below and an appeal taken therefrom. It is notable that the forerunner of section 1253 (Judicial Code Section 266, Title 28, U.S.C.A.) at one time was written so as to include the word "final" before the word "order," but that the word "final" was eliminated by Congress at the time that section 1253 was adopted.

If a new legal area of appeal is created by section 1253 it is still difficult to apply its terms here. The statute authorizes the direct appeal "from an order granting or denying an interlocutory or permanent injunction." Obviously, Appellants cannot appeal from the denial of the injunction by Judge Moore's Court. Our appeal must lie from the *refusal* of Judge Moore's Court to render a decision against the Plaintiff on the merits. It is our position that the Court's failure to grant Appellant's Motion to Dismiss the Complaint was, for all legal purposes, equivalent to the grant of an injunction by that Court. This is not the same proposition as an appeal from an order denying an injunction. A case which is apposite is *Public Service Commission* v. *Brashear Freight Lines,* 306

U.S. 204, (1939). In this case plaintiff sought an injunction against a state agency before a three-Judge District Court. The state agency had counterclaimed for money damages. The Court denied the plaintiff's prayer for relief and likewise denied the counterclaim for money damages. The state agency then attempted to appeal directly to the Supreme Court. The Court held it had no standing to appeal because there was no action by the lower court granting or denying an injunction. The *Brashear* case is distinguishable from the case at bar and is not, we suggest, a bar to the noting of probable jurisdiction in the Supreme Court. It is our contention that the three judge statutory court was improvidently convened since action by local officers and not state officers was sought to be enjoined. In the Opinion below (Appendix A, *infra* p. 1a) the only logical inference to be drawn as to the action of the statutory court is that the court improperly retained jurisdiction and refused to rule on the merits for or against either side. Therefore, even if an injunction was neither granted nor denied, we are entitled to take this appeal.

As stated, this appeal presents the vitally important question of whether the Equal Protection Clause of the Fourteenth Amendment in respect to reapportionment extends to the lowest level of local government. This appeal further presents the important question of whether Federal District Courts under U.S. Code Title 28, section 2281 et seq. should assume jurisdiction upon a complaint such as the one involved in this case and the record presented.

It is well settled, and the Appellants do not deny that the Supreme Court of the United States has issued unequivocal rulings to the effect that as to Con-

gressional Districts within the boundaries of states and state legislatures themselves, reapportionment must take place so as not to disenfranchise large bodies of voters. *Baker* v. *Carr,* 369 U.S. 186 (1962); *Reynolds* v. *Simms,* 377 U.S. 533 (1964); *Gray* v. *Sanders,* 372 U.S. 368 (1962). These decisions were based upon the Court's reading of the Fourteenth Amendment to the U.S. Constitution under which no person may be denied the equal protection of the law with respect to his vote. Does the Fourteenth Amendment reach beyond the reapportionment of state legislatures? We contend that the District Court appears to have held that it does, and yet there is grave doubt about the meaning of this holding since the Court declined to exercise the necessary powers that would flow from such a preliminary decision. We contend that the decision that reapportionment for Suffolk County must take place does not properly involve an interpretation of the Fourteenth Amendment by a Federal Court. Malapportionment at the Suffolk County level must be corrected otherwise, if it exists. It must come from either the county itself under the Municipal Home Rule Law, from the state legislature, or as a result of an interpretation of the Constitution of the State of New York by the courts of that state.

We believe that the appeal presents serious questions of substance as to whether the District Court in its interpretation of the applicable decisions of the Supreme Court was in error in taking jurisdiction over this question, as to its apparent holding on the Fourteenth Amendment point, and whether the federal judiciary properly should concern itself with local elections, and finally, a proper interpretation of the federal judiciary's role in local municipal elections. We

further submit that neither the Federal Declaratory Judgment Act nor the Civil Rights Act cited by Appellees as grounds for its suit appropriately confer jurisdiction under the facts of this case. Accordingly, the questions are of ultimate and vital national public importance and the Supreme Court of the United States should take jurisdiction of this appeal and reverse and dismiss the suit on the ground that no substantial federal question is involved.

Article 4 Section 4 of the Constitution provides "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the Executive (when the legislature cannot be convened) against domestic violence."

In general, the enforcement of this constiutional guarantee is not for the courts. It is primarily a legislative power residing in Congress. *Highland Farms Dairy* v. *Agnew,* 300 U.S. 549 (1937) (Mr. Justice Cardozo). In *Highland* the Court held that distribution of power by the state among its governmental organs is commonly if not always, a question for the state. "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. The statute is not a denial of a republican form of government. Even if it were, the enforcement of that guarantee, according to the federal doctrine, is for Congress, not the courts." *Pacific Telephone Company* v. *Oregon,* 233 U.S. 118 (1912).

Since the power thus exercised is a Congressional rather than a judicial power, the next question to be decided is what the purpose of the constitutional guar-

antee may be. In *Eckerson* v. *Des Moines,* 115 N.W. 177, 137 Iowa 452 (1908) the Court stated that "The purpose of the Federal Constitution was to provide a form of government, republican in character, for the states as a united whole, and not to control the systems of local government, and therefore, a statute is valid providing a form of municipal government which ignores the features of executive, legislative, and judicial departments and commits the functions of government to a single body." To the same effect are *State Ex Rel Porterie* v. *Smith,* 1936, 166 So. 72, 184 La. 283; *Walling North Central* v. *Texas,* 359 S.W. 2d, 546 (1962); *State* v. *Hearn,* 155 P. 1066, 59 Or. 227 (1911).

In *Reynolds* v. *Sims, supra,* Chief Justice Warren discussed claims based on an alleged violation of this constitutional clause as relating to reapportionment and stated that while such claim does not present a justiciable controversy that fact has nothing to do with the fact that those claims touch upon matters of state governmental organizations. *Baker* v. *Carr, supra,* makes it clear that in reapportionment cases the Court does not regard this constitutional clause as a valid basis for violation of state constitutions by state legislatures. It asserts the constitutional power of the Fourteenth Amendment but in no way sets aside the argument that Article 4 section 4 which guarantees a republican form of government *leaves to the states the determination of what Mr. Justice Cardozo called "the distribution by a state power among its governmental organizations."* The Supreme Court has never said the Constitution guarantees *counties* a republican form of government.

It is our contention that Article 4 section 4 is the constitutional source for the following:

1. We do not quarrel with the right of the federal judiciary to apply the Fourteenth Amendment to the malapportionment of Congressional Districts.

2. We do not quarrel with the right of the federal judiciary to apply the Fourteenth Amendment to the reapportionment of state legislatures.

3. We do find in the guarantee of a republican form of government and in the language of Mr. Justice Cardozo a persuasive argument that below the level of Congressional Districts and State Legislatures, the states have a useful basis for acting where states can best serve their own needs. If what they do is in violation of the federal constitution there are ample remedies available.

The present posture of our case, therefore, as it relates to the role of the Federal Government approved in *Highland Farms, supra,* is whether while action at the state level is pending (there are several cases upon appeal in the state courts as yet unreported and a number of amendments relating to county apportionment in the New York State Legislature) the courts should inject themselves in contravention of the normal rules governing federal-state relations. More explicitly, the federal court must, as Mr. Justice Cardozo says in *Highland Farms, supra,* where a statute is not a denial of a republican form of government, take state statutes as they find them unless there is a clear violation of the federal or state constitution. It seems apposite that there is a potential violation of Article 4 section 4 in our case, if the decision below is allowed to stand.

If the purpose of the federal constitution is not to control the systems of local government because the federal government guarantees to each state a repub-

lican form of government, then the federal judiciary should not be called upon to apply the Fourteenth Amendment to every local ordinance involving voting rights. If the doctrine of *de minimis* means anything it ought to be applied here. Nor should the federal judiciary become involved in the apportionment of the hundreds of thousands of cities, towns and villages and in addition, in the hundreds of thousands of state and local agencies which exercise legislative or quasi legislative functions. Unless this view is adopted the federal judiciary will entend its supervisory powers under the Fourteenth Amendment to civil service commissions, welfare boards, public health boards, zoning boards, and such other local legislative and administrative bodies. This is certainly a result not contemplated nor required by the Constitution. If it is assumed that the standard of "one man-one vote" must apply at every level of government, we must take the position that the application of such a principle is for the state judiciary, the state legislature and the state executive. The Supreme Court itself doubtless did not have this standard in mind for counties.

In *Brouwer* v. *Bronkema,* No. 1885 Circuit Court, Kent County, Michigan (Sept. 11, 1964) the first case heard in a state court after *Reynolds* v. *Sims,* supra, the Circuit Judge of Kent County, Michigan, relying on *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960) arrived at a decision which leaves unanswered the pressing questions raised by this appeal. The Court in *Brouwer,* supra, reasoned that there being no fundamental difference between state and municipal legislative bodies under the Equal Protection Clause a malapportioned county must be reapportioned under the doctrine of *Reynolds, supra.* The trouble with this easy transference is this: let us assume that whether

by state action or under the necessities of the Supreme Court's rulings, a state legislature has been reapportioned under a plan which meets the tests imposed by the Court under the Fourteenth Amendment. Let us assume further that a reapportioned legislature delegates some of its legislative functions to a political subdivision, such as the county here involved. Next, add the following alternate assumptions:

1) The County Board of Supervisors is malapportioned.

2) The County Board of Supervisors is reapportioned on a population basis by an act of the legislature.

3) The County Board of Supervisors is reapportioned on a population basis by its own affirmative act (such as the adoption of a "weighted-vote" plan.)

4) The County Board of Supervisors is reapportioned on a population basis by an election held under charter referendum.

5) The County Board of Supervisors exercises the delegated legislative functions of a malapportioned state legislature.

Where does this lead? It is our position that a *state legislature, such as* the New York Legislature, *that is legally apportioned according to a population basis* and whose composition meets the tests of the Equal Protection Clause has the *sole constitutional authority to see to it that it delegates its legislative functions, reserved to it by the Tenth Amendment.* The federal courts ought not and cannot do more than to order reapportionment of that body, the legislature, which

exercises all powers reserved to the state by the Tenth Amendment, including the exercise or delegation of such reserved powers. If such is the case, why should a different result obtain merely because the New York Legislature saw fit to grant a measure of home rule to Suffolk County? For example no one could successfully contend that the Fourteenth Amendment of the United States Constitution—bearing in mind the powers reserved by the Tenth Amendment of the Constitution—requires that a properly apportioned state legislature *must* delegate powers to its political subdivisions in *any* particular manner. For further example, a properly apportioned New York State Legislature could constitutionally provide that such powers—legislative, administrative, fiscal—as it saw fit to give the County of Suffolk, might be exercised by an appointive official or body.

The legal rationale for this proposition is that in the case at bar, the judicial and legislative remedies available under the laws of New York, as shown below, are adequate, plain, speedy and available to Appellees.

Ample legal precedent for the soundness of this argument is to be found in an analogous field, that is, the relationship between the federal courts and state taxing authorities. Section 267 of the Judicial Code, (now cited as 28 U.S.C. 384) provides that suits in equity shall not be sustained in the federal courts "in any case where a plain, adequate, and complete remedy may be had at law."

In *Matthews* v. *Rodgers*, 284 U.S. 521 (1932) at page 524, the Court said: "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their

fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." Mr. Justice Douglas in *Hillsborough Township* v. *Cromwell*, 326 U.S. 620 (1946) commenting upon the law, stated: "Where the remedy at law is 'plain, adequate, and complete,' it is the one which must be pursued *even for the protection of any federal right.*" (emphasis supplied.) In reviewing the implication of the Equal Protection Clause of the Fourteenth Amendment Mr. Justice Douglas had occasion to distinguish *Great Lakes Dredge and Dock Co.* v. *Huffman*, 319 U.S. 293 (1943), which held that the policy leading federal courts to refrain from using the extraordinary powers of equity should likewise be exercised. The Court's discretion in that case withheld relief under the Federal Declaratory Judgment Act, which is one of the alleged jurisdictional grounds upon which the Appellees in the case at bar based their complaint in the lower court. The Supreme Court held in *Hillsborough Township, inter alia,* that the Equal Protection Clause protects a citizen from state action which selects him out for discriminatory treatment. The right, the Court said, which the citizen has under the Fourteenth Amendment is the right to equal treatment but the remedy is a legal rather than an equitable one, and the legal remedies must be exhausted.

Furthermore, *Hillsborough Township, supra,* held that where a federal Constitutional question turns on the interpretation of local law and the local law is in doubt, the proper procedure is for the federal court to hold the case until a definite determination of the local law can be made by the state courts. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941); *Chicago* v. *Fieldcrest Dairies,* 316 U.S. 168

(1942); *Spector Motor Service Inc.* v. *McLaughlin*, 323 U.S. 101 (1944). *Hillsborough Township*, Mr. Justice Douglas points out, involved a situation in which it was "clear that there was available a state remedy to which the complainant could resort on the remand of the cause." There are pending in the courts of New York actions brought to determine the meaning of statutes providing legislative and judicial remedies for malapportionment.

Leaving the matter of proper county apportionment to the case by case federal court determination "represents an abnegation of legislative responsibility and places an unfair and undesirable burden on the judiciary." (Weinstein, *"The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government."* Columbia Law Review, January, 1965, Vol. 65, No. 1, page 24.)

In New York, counties are delegated legislative powers by acts of the legislature as it sees fit. When one examines the total extent of legislative power in the hands of the Board of Supervisors of Suffolk County it will be found that it exercises no taxing power, no zoning power, and does not even have control of all the funds expended by it. In such a situation it is difficult to see how jurisdiction exists for the federal courts.

The cases decided by the Supreme Court cited herein on reapportionment hold only that when a state unit is controlled by voters all voters must be treated as equally as possible. They did not hold that every state unit of government needs to be in charge of elected officials nor that agencies exercising delegated legislative or quasi-legislative functions need be reapportioned to a "one man-one vote" standard.

Closing this argument, the theory of local government must be that the administration of the affairs of a county or a city is more akin to the conduct of a business corporation than it is to that of the government of a state. Unless this theory were true and in practice followed in almost every county and municipality in the United States we would have the cumbersome spectre of the federal analogy applied to every unit of local government. Since Chief Justice Warren rejected the federal analogy in *Reynolds* v. *Sims, supra,* and in the other major apportionment cases, we can assume that the Constitution does not mean a senate and assembly for every local government. If this assumption is correct, then the next logical question to be answered is whether in fact the Constitution taken as a whole can be interpreted to invite "one man-one vote" rules in such an impractical manner.

Should the District Court Below Have Ruled That Appellees Had a Plain and Adequate Remedy at Law?

Appellants frankly concede that properly reapportioned state legislatures must follow this Court's rulings. We have conceded from the outset that the Suffolk County Board of Supervisors do not vote in accordance with numerical representation of town voters. The fact of disparity is accepted. However, it is our position that adequate remedies are available to Appellees outside the federal judiciary system. These remedies exist under the present law and have existed in New York State for many years. The legal machinery is provided for and the task can be accomplished efficaciously on the local level. Wherein should the federal judiciary invoke its extraordinary equity powers to enjoin county officers, assuming *arguendo* that it has such powers?

We have surveyed the leading cases in the Supreme Court on reapportionment. Our study shows that the Court has provided an appropriate remedy only upon its decision that there is no adequate remedy available to the under-represented petitioners. Especially in cases of racial discrimination against voters has the Supreme Court extended more than its usual equitable consideration. In cases involving racial discrimination against voters the Supreme Court has shown it will not be restrained by the doctrine of abstention or any other doctrine, and it will act whether there is a remedy at law or not.

We contend that there being no element of racial discrimination in the case at bar, there being far-reaching, significant and useful remedies of a judicial and legislative nature, the Court's role in the present dispute is one of necessary judicial restraint involving a careful look at the remedies sought to be invoked. In previous reapportionment cases, as stated, the Supreme Court invoked its equity powers to order corrective action at a local level of government only where racial discrimination against a class of citizens was practiced as a result of state and county laws. The Supreme Court has never extended its equity powers against the *"invidious discrimination" present at the local level of government where there was no racial discrimination nor any emergency reason why adequate remedies at state law could not be used.*

A. Reapportionment cases in which an absence of an adequate remedy at law was noted:

1. *Baker* v. *Carr, supra* (footnote 14 at page 193: "There is no provision for popular initiative in Tennessee.")

2. *Reynolds* v. *Sims, supra* (at page 533: "No effective political remedy to obtain relief against alleged malapportionment of the Alabama legislature appears to have been available. No initiative procedure exists under Alabama law.")

3. *WMCA* v. *Lomenzo, supra* (at page 653: "No effective political remedy to obtain relief . . . and no judicial relief in the state courts to remedy the alleged malapportionment was presumably available.")

4. *Maryland Committee for Fair Representation* v. *Tawes, supra* (page 658: "Maryland law makes no provision for the initiation of legislative or constitutional amendments by the people.")

5. *Davis* v. *Mann, supra* (at page 689: "No effective political remedy . . . no initiative procedure is provided for under Virginia law.")

6. *Roman* v. *Sincock,* supra (at page 706: "No initiative and referendum procedure exists in Delaware.")

7. *Lucas* v. *Forty-Fourth General Assembly of Colorado, supra* (footnote 3 at page 716: "Plaintiffs did not have adequate, speedy and complete remedy.")

B. The following cases all involved clear racial discrimination designed to prevent citizens of the Negro race from voting; therefore, adequacy of the state remedies was not discussed by the Supreme Court, or it was totally ignored because of the outrageous circumstances involved:

Giles v. *Harris,* 189 U.S. 475 (1903); *Nixon* v. *Herndon,* 273 U.S. 536 (1927); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1963); *Gray* v. *Sanders,* 372 U.S. 368 (1962); *Wesberry* v. *Sanders,* 376 U.S. 1 (1963); *Wright* v. *Rockefeller,* 376 U.S. 52 (1964).

C. In one case, although outrageous circumstances were present involving racial discrimination against a class of voters, the question as to the adequacy of the remedy at law was discussed in *Lane* v. *Wilson,* 307 U.S. 268 at page 274 (1939):

"Normally the state legislative processes sometimes exercised through the administrative powers of the state court must be completed before resort to the federal courts can be had."

D. In the following cases the question of the adequacy of the remedy at law or at the state judicial and/or legislative level was discussed without the outrageous circumstances of racial discrimination:

In *Colegrove* v. *Green,* 328 U.S. 549 (1946), there appears at page 552 the following: "The basis for the suit is not a private wrong but a wrong suffered by Illinois as a polity." In *Glass* v. *Hancock County,* (1963) the appeal was dismissed by the Supreme Court (378 U.S. 588), but the Supreme Court of Mississippi pointed out that the Mississippi Code provided for a complete and adequate remedy at law for the denial of the rights complained of (156 So. 2d 825 at page 830).

It is clear that without outrageous circumstances present the Supreme Court has consistently searched the record in reapportionment cases for the absence of adequate remedies at law which would justify the invoking of federal equity jurisdiction under the Fourteenth Amendment.

Under the present law, Suffolk County could, subject to mandatory referenda, reapportion its Board of Supervisors by amending its charter to provide for elections at large for an apportionment. The Board

itself could institute a temporary system of weighted voting, fractional voting, or a combination of such alternatives, subject to approval by the voters at mandatory referenda. An amendment to the Municipal Home Rule Law for Suffolk County and all other charter forms of county government is presently being considered by the New York legislature. We invite the Court's attention to the fact that all of the following remedies at law were available at the time this suit was filed:

1. Judicial Remedies

A. Writs of mandamus or prohibition relative to the enforcement of voting and representation provisions in existing legislation.

B. An authoritative interpretation by the Courts of the State of New York of the constitutionality of Section 203 Suffolk County Charter, and Sections 150 and 153 (4) of the County Law.

Section 203 provides:

> "Voting; quorum. Each supervisor shall have one vote. A majority of the whole number of the members of the board shall constitute a quorum. Except as otherwise provided by law, local laws and resolutions shall be adopted by a vote of not less than a majority of the total membership of the board. In case of a tie vote on any matter at any meeting of the board of supervisors the county executive shall have a casting vote, provided however, that he shall not have a vote as to any local law or resolution which provides a new form of government, for the county or changes the voting strength of the supervisors, or which changes the location of the county seat."

Section 150 of the County Law:

> "Board of Supervisors Constituted—These supervisors of the several cities and towns in each county, when lawfully convened shall constitute the Board of Supervisors of the County."

Section 153(4) provides in pertinent part:

> "Whenever in this chapter or other general, special or local law, the board of supervisors is authorized or required to act, and no proportion of the voting strength for such action is otherwise prescribed, such action shall be taken by the affirmative vote of a majority of the total membership of the board. . . ."

Unreported cases involving these principles:

> State of New York Supreme Court; Broome County, *Augostini et al* v. *Lasky et al; Monroe* County, *Goldstein et al* v. *Rockefeller et al;* Broome County, *Seamen et al* v. *Fedourich, et al;* Sullivan County, *Shilbury* v. *Board of Supervisors of County of Sullivan.*

C. An interpretation of the state constitution providing as follows: Article 9, Local Governments, Section 1, (Bill of Rights for Local Governments):

> "(a) Every local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof. Every local government shall have power to adopt local laws as provided by this article."

2. Statutory Rights

A. The ordinary process of petitioning the Board of Supervisors to create a special committee to study reapportionment is available to Appellees. (See County Law 154, Section 2, 3, 4 and 5.)

"2. The board may from time to time create special committees. Any resolution creating a special committee shall specify the powers and duties of the committee and the number of its members. Each member of any special committee shall serve for the period specified in such resolution but in any event not longer than the term for which he shall have been elected as a supervisor."

"3. Members of all standing and special committees shall be appointed by the chairman of the board from its membership."

"4. Vacancies in standing and special committees shall be filled by the chairman of the board from its membership."

"5. The board may authorize committees to accept advice and counsel of citizens not members of the board."

B. A petition for referendum is a right available in Suffolk County. (See Suffolk County Charter, Section 2210.)

"2210. Petitions for referendum. Whenever in this charter a question is to be submitted to referendum of the electors of the county by petition, such petition shall be verified or authenticated in the manner provided in the election law with respect to designating petitions. All papers severally containing such requests and signed and so verified or authenticated when bound together and offered for filing, shall constitute one petition."

The election law referred to in Section 2210 is more fully described in County Law Section 102(2) as follows:

"2. The board of elections shall cause any such proposition to be submitted to the qualified electors of the county in the manner provided in the elec-

tion law. The method and manner of submission preparation and provision of ballots and ballot labels, use of voting machines, qualification of voters, correcting registers, and conducting the election, canvassing the result and making and filing the returns, and all other procedure with reference to the submission of any such proposition to be submitted to the electors of a county at a general or special election as provided by law. If a majority of the votes cast on any such proposition shall be in the affirmative, the resolution shall be approved. As amended L. 1951, c. 652, § 1; L. 1963, c. 431, eff. Jan. 1, 1964."

C. The modification of the Suffolk County Charter in order to provide for proper reapportionment in the county is a right available to the Appellees. (See Section 2303 the Suffolk County Charter);

"§ 2303. Amendment of Charter. This charter as an alternative form of government may be amended in accordance with the state constitution, applicable statutes and the provisions hereof."

The above statutory rights are available and have always been available to the Appellees subject to referendum. (see Municipal Home Rule Law, Section 24 as follows:)

"A local law subject to referendum on petition as provided in this section or in any other state statute, if not also subject to mandatory referendum, shall not take effect until at least forty-five days after its adoption; nor until approved by the affirmative vote of a majority of the qualified electors of the local government voting on a proposition for its approval if within forty-five days after its adoption there be filed with the clerk a petition protesting against such local *law, signed, and authenticated as herein required by qualified electors of such local government, registered to vote*

therein at the last preceding general election, in number equal to at least ten per centum of the total number of votes cast for governor at the last gubernatorial election in such local government." (emphasis supplied.)

D. The elected representatives of Appellees constituting the Board of Supervisors have the power to amend, repeal, and supersede local laws. The Appellees therefore have the added right to petition their elected representatives to institute immediately a temporary device of weighted voting or fractional voting or a combination of such alternatives. This is in accordance with County Law 153, Section 1 through 6 as follows:

"1. A power of the county, whether in terms vested in the county or in the board of supervisors shall, except as otherwise expressly provided, be exercised through a local law or resolution duly adopted by the board."

"2. A majority of the duly constituted membership of the board of supervisors shall constitute a quorum for the transaction of business, but a less number may adjourn."

"3. Each local law or resolution shall have a title prefixed concisely stating the contents."

"4. Whenever in this chapter or other general, special or local law, the board of supervisors is authorized or required to act, and no proportion of the voting strength for such action is otherwise prescribed, such action shall be taken by the affirmative vote of a majority of the total membership of the board. A roll call shall be taken and entered by the clerk in the minutes of its proceedings when required by law or upon request of any member of the board."

"5. All resolutions shall become effective upon their adoption or as otherwise provided by this chapter or other law or as specified in the resolution."

"6. Subject to the restrictions provided in this chapter or other law, the board of supervisors shall have power to amend, repeal or supersede any local law or resolution theretofore adopted."

E. When the Board itself institutes such a system it is subject to the approval by the voters at mandatory referenda in accordance with the Municipal Home Rule Law. (Laws of New York (1962) Chapter 36A)

The reapportionment of a local unit of government which derives its powers by delegation from a state legislature is essentially a legislative matter. Where the legislature fails or refuses to act, state and federal judiciary remedies at law cited above are available. In New York, actions have been brought in Albany County, Broome County, Monroe County and Erie County to determine the meaning of the statutory remedies in New York. These are actions in the state courts upon which no definitive judicial answer has as yet been made.

In the case at bar, Appellees have given no thought nor any weight to *any* of the rights available to them save the one they unsuccessfully sought in the Court below. They are asking this Court to apply constitutional principles in a precipitious and uncalled for manner. Courts should not use extraordinary power, nor should they consider alleged constitutional questions when the case may be disposed of satisfactorily otherwise; that is, by deference to statutory remedies readily available to them. The case at bar is an excellent example of a time, we respectfully suggest, that the

Supreme Court direct lower federal courts to refrain from getting into political controversies and to exercise judicial restraint.

We contend that the District Court below should have exercised judicial restraint and ruled that Appellees had plain and adequate remedies at law. In *Baker* v. *Carr, supra,* a three-judge court was convened under 28 U.S.C. section 2281 in the Middle District of Tennessee. The District Court dismissed the complaint which alleged that a Tennessee statute that had improperly apportioned the Tennessee General Assembly had unconstitutionally denied citizens equal protection. The Supreme Court held the dismissal was an error and remanded the cause to the District Court. Mr. Justice Brennan delivered the decision of the Court, and stated:

> "Tennessee has no initiative and referendum . . . the majority of the people of Tennessee have no *practical opportunity for exerting their weight at the polls* to correct the existing *invidious discrimination.* The majority of the voters have been caught up in a legislative straightjacket." (*ibid* at page 193)

However, there is no straightjacket in the case at bar because appropriate remedies do exist in New York State as we have shown above.

Justice Frankfurter's dissenting opinion in the *Baker* case raises another significant distinction. He anaylzes *Gomillion* v. *Lightfoot, supra,* as a case involving discrimination against the Negro's right to vote and sees it as a clear exception . . . "For here the controlling command of Supreme Law is plain and unequivocal." (*ibid* at page 285)

However, there is no clear "command" in the case at bar. There is no racial discrimination here.

There exists a long series of cases in which the Supreme Court, prior to *Baker* v. *Carr, supra,* had refused to restrict the states in the state's power to allocate electoral weight among the voting populations of their various subdivisions. Justice Frankfurter relied heavily on *Colegrove* v. *Green,* 328 U.S. 549 (1946) in his analysis.

Among those cases so cited by Justice Frankfurter, we invite the Court's attention to *Matthews* v. *Handley,* 179 F. Supp. 470 (1959) aff'd 361 U.S. 127 (1959) which has never been reversed, nor even distinguished, by the Supreme Court nor any Federal Court. In *Matthews, supra,* taxpayers alleged before a three-judge District Court that as citizens of Indiana they had a right to a properly apportioned legislature, which did not exist at the time of the passing of the State Income Tax Act; they, therefore, sought to have the act declared unconstitutional and further that the state officers be enjoined from collecting the tax.

The three-judge District Court granted defendants' motion to dismiss on the ground that Courts of Equity will not act when an adequate legal remedy exists, and Judge Grant's language is as follows:

> "Historically, since the dawn of Courts of Equity in our Anglo-American system of jurisprudence, it has been held that Courts of Equity will not act in such a circumstance as here when adequate remedies exist. Plaintiffs have an adequate legal remedy available. Plaintiffs are asking this Court to concern itself with a purely state political question. The plaintiffs have the power of the ballot to correct any unrealistic apportionment of the State Legislature which might exist." (*ibid* at page 471)

In the State of New York and in Suffolk County plain and adequate remedies existed in the state courts

and through the ordinary legislative processes on the local level. Appellees have a right to redress, but there is nowhere in the record any indication that any effort was put forth at any time to seek the redress by means of the remedies prescribed by law. This is no *Baker* v. *Carr* situation, for in that instance the voters of Tennessee had absolutely no recourse but in the federal courts. Also there is here no clear "command" as in the *Gomillion* v. *Lightfoot, supra* case where a broad racial question arose.

In *Gomillion v. Lightfoot, supra* a plan for redrafting municipal boundaries was struck down on a single issue: discriminatory treatment of a racial minority violating the Fifteenth Amendment, but the Supreme Court used language clearly limiting the power of the states to control municipal boundaries, and when quoted out of context, the following statement in *Gomillion, supra* has often been misapplied:

> "When a state exercises power wholly within the domain of state interest, is is insulated from federal judicial review. But such insulation is not carried over when a state power is used as an instrument for circumventing a federally protected right." (*ibid* at page 347)

This must refer to a federally protected right specifically being discussed in the prior paragraph:

> "If the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens and only colored citizens of their theretofore enjoyed voting rights."

The case of *Glass* v. *Hancock, supra,* contains a fact situation that is more clearly analogous to our fact

situation than *Baker* v. *Carr, supra,* or *Gomillion* v. *Lightfoot, supra.* In *Glass*, a bill of complaint was filed in the Chancery Court of Hancock County, Mississippi by Hancock County citizens who alleged that the county board of supervisors' failure to redistrict violated the Equal Protection Clause of the Fourteenth Amendment. A general demurrer to the bill of complaint was sustained by the County Court on the ground that there was no equity on the face of the bill for the reason that there was a plain and adequate remedy at law. In the Mississippi case the citizens at no time requested their board of supervisors to redistrict the county, just as in our case there has been no petition for the establishment of a committee to establish reapportionment. In *Glass, supra,* the bill asked for injunctive relief which is an extraordinary remedy, yet there was no record that the ordinary remedies of petition and referendum were being utilized. Nowhere in the bill of complaint in *Glass, supra,* is it contended that the particular section of the Mississippi code failed to furnish an adequate remedy for the violation of the rights complained of nor had Plaintiffs there at any time exercised their rights under the Mississippi code. This is identical to the situation in the case at bar where the judicial remedies and legislative remedies are available and nowhere in the complaint was it contended that these failed to furnish a clear, adequate remedy at law.

CONCLUSION

If this Court should hold that it does not have appropriate jurisdiction to note this case for hearing and argument by reason of any procedural defect on appeal from a three-judge statutory Court, or for any other valid reason, Appellants respectfully request the Court to pass an Order allowing additional time for filing notice of and an appeal to the U.S. Court of Appeals for the Second Circuit. This request is made not as a concession that this appeal is improvidently made, but for the purpose of suggesting to the Supreme Court the interposition of an appropriately equitable procedural remedy which has been approved by the Court in many cases. The leading case is: *Oklahoma Gas & Electric Co. et al.* v. *Oklahoma Pacing Co. et al.*, 292 U.S. 386 (1934); citing *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16 (1934); *Healey* v. *Ratta*, 289 U.S. 701, (1933).

It is submitted that the Supreme Court has jurisdiction, and it should hear this appeal and reverse the Court below with instructions to grant Appellants' Motion to Dismiss the Complaint. The questions herein are new, substantial and important to the continued

vitality and existence of local subdivisions of state government.

Respectfully submitted,

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APPENDIX A

1. Decision of Three Judge Statutory Court dated February 1, 1965

2. Order and Judgment of Statutory Court dated March 3, 1965

UNITED STATES DISTRICT COURT

E. D. NEW YORK

Feb. 1, 1965

Civ. A. No. 62-C-821

I. WILLIAM BIANCHI, JR. and QUENTIN B. SAMMIS, *Plaintiffs,*

v.

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. FLYNN, ARTHUR M. CROMARTY and THOMAS J. HARWOOD, constituting the Board of Supervisors of Suffolk County, New York, *Defendants.*

* * * * * * * * * * *

Before MOORE, Circuit Judge, and BRUCHHAUSEN and DOOLING, District Judges.

MOORE, Circuit Judge.

Plaintiffs, I William Bianchi, Jr., and Quentin B. Sammis, residents of the Towns of Brookhaven and Huntington, Suffolk County, State of New York, bring this action in their own behalf and in behalf of all other taxpayers and voters of Suffolk County, against the ten individual defendants, each of whom is an elected Supervisor of his respective town and who collectively constitute the Board of Supervisors of Suffolk County (1) to declare void and invalid as violative of the Fourteenth Amendment of the United States Constitution so much of Section 203 of the Suffolk County Charter, Laws 1958, c. 278 as provides that each Supervisor shall have one vote as a member of the Suffolk County Board of Supervisors; (2) to enjoin the

defendants from acting as the Board of Supervisors unless and until a change in their voting strength is made; and (3) to cause to be convened a three-judge court to hear and determine the case (28 U.S.C. § 2281 et seq.). A motion was made to dismiss the complaint upon the ground, amongst others, that no substantial federal question is raised. The motion was denied without prejudice to renewal before a three-judge court, Bianchi v. Griffing, 217 F. Supp. 166 (E.D.N.Y. 1963). Thereafter, a three-judge court was convened and a hearing was held, upon which the motion to dismiss was renewed.

[1] Many cases have been pending in the Supreme Court and in other courts arising out of the decision in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) but despite the plethora of cases filed and the Supreme Court decisions of June 1964, there has been found no Supreme Court case which overturns the principle announced by that Court that section 2281 does not apply where "although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved." Ex parte Collins, 277 U.S. 565, 568, 48 S.Ct. 585, 586, 72 L.Ed. 990 (1928). See also Rorick v. Board of Com'rs, 307 U.S. 208, 59 S.Ct. 808, 83 L.Ed. 1242 (1949); Ex parte Public Nat'l Bank, 278 U.S. 101, 49 S.Ct. 43, 73 L.Ed. 202 (1928).

The recent Supreme Court decisions (June 15, 1964)[1] have decided that "the seats in both houses of a bicameral state legislature must be apportioned on a population

[1] Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); WMCA Inc. v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568 (1964); Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595 (1964); Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609 (1964); Roman v. Sincock, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed.2d 620 (1964); Lucas v. Forty-Fourth General Assembly of State of Colo., 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964).

basis." Reynolds v. Sims, 377 U.S. 533, 568, 84 S.Ct. 1362, 1385, 12 L.Ed.2d 506 (1964); that such apportionment must be "sufficiently on a population basis to be constitutionally sustainable." WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653, 84 S.Ct. 1418, 1428, 12 L.Ed.2d 568 (1964); and "the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act." Lucas v. Forty-Fourth General Assembly of State of Colo., 377 U.S. 713, 736, 84 S.Ct. 1459, 1473, 12 L.Ed.2d 632 (1964). The Court found "no significance in the fact that a non-judicial, political remedy [such as initiative and referendum] may be available for the effectuation of asserted rights to equal representation in a state legislature." Ibid. In other words, the fact that "a majority of the people choose to do so," and that a "legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in Reynolds v. Sims." Id., 377 U.S. at 737, 84 S.Ct. at 1474.

However, these cases all dealt with the election of state legislative bodies. To date the Court has not had to consider whether the Equal Protection Clause applies as well to the method of electing the officials of hamlets, villages, school, fire, sewerage and water districts, towns, cities or counties, whether, that is, the right to vote is protected by the Equal Protection Clause in its every exercise, or only in some restricted class of definably important voting occasions.

This Suffolk County case does not involve the election of members of the houses of the state legislature. It does attack, however, the provision of the Suffolk County Charter whereby the County Board of Supervisors, which has a local legislative authority, is to consist of the elected Supervisors of each of the county's ten towns.

The basic theory of the action is disparity of representation. Concerning disparity, there can be no question. The ten towns of Suffolk were never of equal population; town lines were not drawn on a population basis and did not profess to be so drawn. In addition, over the years radical population changes as a result of economic and industrial developments have taken place in eastern Long Island. The locations of large defense plants in this area has brought thousands of families into the westerly towns of Suffolk County. The eastern area remains thinly populated; the western has become rather densely populated. Thus, for example, the town of Shelter Island finds itself about as it was 150 years ago with its population stabilized at some 1,300 persons whereas the towns of Islip, Huntington and Babylon, to take extreme cases, have some 172,000, 126,000 and 142,000[2] persons, respectively.

Each town has elected its chief executive officer (the supervisor) and no fault can be found with this practice. The trouble arises, so aver the plaintiffs, because the supervisors of the ten towns constitute the Board of Supervisors of the County which is the legislative body of the County. Little mathematical ingenuity is required to prove plaintiffs' thesis that the vote in County management affairs by the Supervisor from Shelter Island is representative of 1,300 persons whereas the equal vote of the supervisor of the town of Islip is representative of over 172,000 persons. The individual vote ratio is over 100 to 1 in favor of Shelter Island and against Islip. If county government within the States must conform to the Equal Protection Clause, as must congressional and legislative districts in the various States, then obviously Baker v. Carr, supra, and the June 1964 cases, supra, call for action. But first there is the fundamental question of how far should the federal judiciary go, or interest itself, in extending Reynolds v. Sims to local governmental bodies

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[2] 1960 census.

in states the legislatures of which are now required to be apportioned on a population basis. The question is not easy to decide. Like so many legal problems, the solution may well be dependent upon degree.

Baker v. Carr and kindred cases presented fairly simple situations. State constitutions providing for a definite system of representation according to numbers were completely ignored. The legislatures which under their own constitutions should have made the changes required flagrantly refused to obey their own constitutional mandates. In view of such refusals, there seemed to be no other alternative than for the courts to assume this function. Thus, at one end of the popular representation spectrum there is the congressional and state district equality-of-vote-doctrine. At the other end could be taken the logical extreme of the election of village trustees from wards of unequal population: it may be doubtful that the federal judiciary would declare the method unconstitutional and forthwith order a general election by the village at large[3] at least where a re-apportioned legislature exists and change is in the wind.

Between these two extremes lie the many minor governmental units referred to such as fire, water, sewer, school districts, towns, villages and cities. Somewhere in the middle ground falls this Suffolk County case.[4]

Pursuant to its constitutional authority, N.Y. Const., Art. IX, the New York State legislature has given to the counties of the State the right to have a county charter.

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[3] McMillian v. Wagner, 239 F.Supp. 32 (S.D.N.Y., 1964); Ellis v. Mayor and City Council of Baltimore, 234 F.Supp. 945 (D.Md., 1964).

[4] The whole area has been ably and thoroughly discussed by Professor Weinstein. The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government, 65 Colum.L.Rev. 21 (1965).

Such a charter was enacted for Suffolk County and in 1958 (election of November 4, 1958) the people of the county overwhelmingly adopted it. That Charter provides in section 201 for a County Board of Supervisors to consist of the supervisor of each town. By popular approval of the Charter in this form, defendants argue, the people of the county expressed themselves clearly and if there is to be any vestigial remainder to a government "of the people, by the people and for the people," such a vote should be sufficient proof of the wishes of the voters. But, if Lucas is to apply at all levels of local government and is not to be restricted to state legislative apportionment, voter approval would be of no value. Moreover, it may well be that in voting for the "charter," the voters expressed only their approval of its general "home rule" advantages over the earlier system, or it may be that the voters had no clear conception of the fact that the charter preserved the power of a comparatively small percentage of the county's population to elect a potential majority of the county's legislative body. Had the spotlight of publicity been focused on this latter point, the argument from the vote at the 1958 polls would be more convincing.

I

Defendants by their motion to dismiss raise the question of the power of a three-judge federal court to act in the premises. Assuming justiciability, is this provision of the Suffolk Charter of such statewide interest as to be within the jurisdiction of such a court? Relatedly, is a substantial federal question now presented? And is the case, in any event, ripe for injunctive intervention? The cases which have had to deal with the problem of allegedly unequal representation in local-government elections have by no means given it uniform treatment.

In Tedesco v. Board of Supervisors of Elections, 43 So.2d 514 (C.A.La., 1949), a resident of the Third District of New Orleans complained that approximately one-half the people

of the City lived in the Third and Sixth Districts and were represented by only two-sevenths of the Commissioners in whom were vested administrative and executive powers for the City of New Orleans, and that the Louisiana statute producing the result violated the Fourteenth Amendment (United States Constitution). More specifically, the 8.508 voters of the Fifth District elected one Commissioner whereas the voters of the Third District numbering some 48,020 also elected one Commissioner. The court concluded that the statue was not violative of any provision of the Federal Constitution and affirmed the judgment dismissing the suit. An appeal to the Supreme Court was "dismissed for want of a substantial federal question." 399 U.S. 940, 70 S.Ct. 797, 94 L.Ed. 1357 (1950).

In Michigan [Johnson v. Genesee County, Michigan, etc., 232 F.Supp. 567 (E.D.Mich.1964)], the plaintiffs questioned the validity of a sewer improvement authorized by the affirmative vote of the Board of Supervisors of Genesee County, on the ground that the Supervisors so voting represented less than a majority of the population of the county. There were serious imbalances in population representation on the Board, illustrated by one township having some 30,000 inhabitants, another 2,000 yet each having one member on the Board. City representation showed an even wider disparity. The court denied the claim for injunctive relief and dismissed the amended complaint. In the opinion it noted the June 15, 1964, rulings of the Supreme Court and the docketing there of Glass v. Hancock County Election Commission, 156 So.2d 825 (Miss.1963) (appealed dismissed, 378 U.S. 558, 84 S.Ct. 1910, 12 L.Ed.2d 1035 (1964)), in which case the question was raised as to whether the failure to redistrict county supervisor districts, like the failure to reapportion state legislative districts, violated the Fourteenth Amendment where there is population disparity. The Supreme Court of Mississippi had affirmed the denial of injunctive relief on the theory that there was an adequate remedy at law, namely, available statutory pro-

cedure for redistricting. The Michigan District Court also considered Griffin v. Board of Supervisors, 60 Cal.2d 318, 33 Cal.Rptr. 101, 384 P.2d 421 (1964), wherein the court ordered the redistricting of the supervisorial districts of the county. In that case, the California state statute required the districts to be "as nearly equal in population as may be."

Recently in the United States District Court for the Southern District of New York, a plaintiff (a voter of the City of New York) sued the Mayor and other city officials and the Attorney General and Secretary of State of New York alleging that sections of the New York City Charter (Sections 61 and 62 of Chapter 3) were unconstitutional because the voting power of each member of the Board of Estimate is weighted in favor of the less populated Boroughs. The Board of Estimate, the City's principal legislative body, consists of the Mayor, the Comptroller, and the President of the City Counsel, each of whom has four votes and the Presidents of the five Boroughs each of whom has two votes. There is substantial disparity in the populations of the Boroughs. The convening of a three-judge court was sought pursuant to 28 U.S.C. § 2281. Judge McLean denied the motion and, after pointing out that there was no unconstitutionality about the state statute authorizing the City of New York to have its own Charter, said: "That charter applies only to New York City. It is not a state statute of statewide application. The members of the Board of Estimate are city officials acting as such, not officers of the state. * * * It is clear under the authorities that this case does not fall within Section 2281 and that the action should be tried in the regular way by a single judge, not by a three-judge court." McMillan v. Wagner, ... F.Supp. ..., U. (S.D.N.Y.1964).

However, since the Supreme Court's June 15, 1964, decisions, there have been cases extending their principle to lesser units of government than state legislatures. In Michigan (Brouwer v. Bronkema, Circuit Court for the

County of Kent, No. 1855, September 11, 1964), Judge Searl had to consider Kent County, the Board of Supervisors[5] of which consisted of supervisors from 22 townships and 3 cities in the county; the per capita respresentation of each supervisor was most disproportionate. In a comprehensive and well-reasoned opinion, Judge Searl concluded that despite the enactment of the State's 1963 Constitution, "the Fourteenth Amendment voids the entire Michigan Plan."

On October 21, 1964, in an informal opinion wherein he, in effect, adopted Judge Searl's opinion, Judge Mize (Damon, et al. v. Lauderdale County Election Commissioners, et al., Civil Action No. 1197-E, U.S.D.C.S.D.Miss.) said that "the Fourteenth Amendment is applicable to redistricting counties as well as the legislatures of the various states."

In Ellis v. Mayor and City Council of Baltimore, 234 F.Supp. 945 (D.Md., 1964), a voter action, declaratory and injunctive relief was sought on the ground that both the existing and the proposed apportionment of the City Council were invalid. The district court decided that the principles applicable to the apportionment of state legislatures applied to the Baltimore City Council.

Most recently in State ex rel. Sonneborn et al., Relators v. Sylvester, County Clerk of Waukesha County, et al., Respondents, 132 N.W.2d 249, filed January 5, 1965, the Supreme Court of Wisconsin held unconstitutional a provision of its state constitution providing for the composition of boards of supervisors on a town, ward and village basis

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[5] Section 7 of Article VII of the Michigan Constitution of 1963 reads:

> "A board of supervisors shall be established in each organized county consisting of one member from each organized township and such representation [representative] from cities as provided by law."

which resulted in substantial disparities in voter representation. In so holding, the court said, "However, county boards possessing the type of legislative power which they do must be considered a unit of government which should be equally representative of the people of the county." And, "Since the composition of the legislature must conform to the principle of equal represenation, it is logical that the arm or political subdivision of such legislature enacting legislation should be governed by the same principle of equal represenation."

After the three-judge court in Johnson et al. v. Genesee County, supra, had returned the case to a single judge for decision (232 F.Supp. 563), Judge Roth wrote that "Under the rule of stare decisis [i.e., he had concluded that "Under the prevailing view of the United States Supreme Court, * * * the composition of local units of government is held to be a state matter"], this Court is not free to consider the subject of the apportionment of representation on local legislative bodies." He qualified this pronouncement, however, with the prophecy that, "It may well be that the time will come when the application of the Fourteenth Amendment will be extended that far. The more likely development is that the June 15, 1964, rulings of the Supreme Court in cases dealing with the state legislatures of Alabama, New York, Maryland, Delaware, Virginia and Colorado will result in legislatures in our states which will be proportionately represenative of people, and therefore, likely to themselves establish in local legislative bodies a vastly different balance between people and governmental power." 232 F.Supp. at 572.

Probably mindful of such possible curative measures being enacted, Judge Searl (Brouwer v. Bronkema, supra) had said, "Consistent with the course indicated as proper in the Reynolds case, this court will defer any action by injunction or otherwise until the 1965 Legislature has had an opportunity to remedy the deviations from constitutional standards in the present Michigan provisions pro-

viding for the membership of the County Board of Supervisors. The court will retain jurisdiction and in the event the Legislature fails to act, after it has had an adequate opportunity to do so, application may be made to this court for an appropriate remedy."

In the Baltimore City Council case (Ellis v. Mayor, etc.), supra, although the court enjoined any election in November 1964 pursuant to certain provisions of the City Charter found to be invalid, it nevertheless said, "We will not undertake a valid reapportionment of the City Council of Baltimore at this time. Under the existing Charter, municipal elections will not again occur until May, 1967. If Resolution No. 1 is adopted, municipal elections will not occur until November, 1967. A general election will be held in November, 1966. There is, therefore, ample time for the City Council to propose a valid scheme of reapportionment and submit it to the voters for adoption before the next municipal election will be held. We will, however, retain jurisdiction of the case pending the adoption and approval by the voters of a valid scheme of reapportionment of the City Council." (234 F. Supp. at 959).

[2] The counties in New York are not established nor are their boundaries drawn by the State Constitution; they are entirely creatures of the legislature. The legislature has the power to alter, amend or even abolish the present charter and its provisions for a Board of Supervisors. It could, as an illustration, create some other "elective governing body" to be elected on a county-wide basis or from election districts that it could define within the County, such body to function with respect to county legislative matters. A reapportioned legislature in New York may well decide that the mold of its creation be impressed upon the counties. Even under the present county charter, the voters can initiate a charter amendment (County Law, McKinney's Consol.Laws, c. 11, § 323). Moreover, a change in voting strength so as to equalize the supervisor representation can be effected by the supervisors themselves.

Under Section 33, subdiv, 5 of the Municipal Home Rule Law, McKinney's Consol.Laws, c. 36-a, the Board of Supervisors has ample power to provide for drafting charter amendments either under its own supervision, or under that of an officer of its designation or by a committee of its appointment or by a charter commission. Under Section 33, subdiv. 6 of the Municipal Home Rule Law, a petition by electors equal in number to ten percent of those who voted for the office of governor in the next preceding election can initiate a charter amendment by petition; the Board of Supervisors must then appoint a charter commission or put the matter to public referendum; if, on referendum, the county electors approve the appointment of a commission, the Board of Supervisors must appoint one.

When the Voters in 1958 approved the Suffolk Charter and the supervisors rejected a change in voting strength in 1962, the populace was not so aware of the existence of means of redressing voting disparity as it is at present. The courts in the ensuing years have supplied many guidelines. Although no state officer is named as a defendant in this suit and even though we were completely satisfied (which we are not) that no activity of the Board of Supervisors touches upon state interests, it would be unrealistic to ignore the similarity which exists between the selection of state and county legislative bodies. In county-wide administration, just as in state-wide administration, the inhabitants of the populous areas should not be governed by representatives drawn from other and thinly populated areas.[6]

[3, 4] It is not for the courts to prescribe the type of representative government that is best suited to the needs of the voters of Suffolk County. The task of the courts is to determine whether particular methods transgress the

[6] The five least populous towns having approximately 10% of the county's population have five supervisors with voting strength equal to the five supervisors representing the remaining 90%.

Constitution. The formulation of schemes of representative government, in the first instance at least, is for the agencies of political action. If an invidiously disproportionate system is continued or approved, even if by a popular majority on referendum, as in Lucas, supra, the problems implicit in the present case will remain for judicial determination.

To deny federal jurisdiction here because state officials have not been made defendants will serve no useful purpose; the defect, if such, is remediable, and despite this deficiency, the constitutional problem remains. To dismiss the complaint without prejudice to a later action alleging substantial but unsuccessful efforts to alter the existing voting procedure by political means, seems needlessly technical. The framework of the action has been constructed. The issues are clearly defined. To retain jurisdiction in the three-judge court to await developments in the state legislature or within the County itself with respect to the selection of the County's legislative body, presents a third alternative.

It is not for this court to speculate about the type of representative government Suffolk County should have. Suffice it to say that the Board of Supervisors is constituted to serve as the legislative body for the County and, upon the present undisputed population disparity, it is not representative of the voters of the County as the Supreme Court has indicated is required of legislative bodies under the Equal Protection Clause.

As stated, the solution of the present problem is, in the first instance, for the agencies of political action. It is not shown that effective and appropriate political action is fettered by any legal obstacle or rendered practically unavailable by any indurated political habit. It is inferable that the matter is ready for significant political action in the light of the analyses of governmental structure that have followed in the wake of Baker v. Carr, supra, and

Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed2d 821 (1963).

If the same or a different but equally disproportionate system is continued, or is approved by a popular majority on referendum, the inquiry will not be at end; it will remain then to determine, if that occurs, whether apathy or even a popular majority can perpetuate or adopt a system that may be found to effect substantial disenfranchisement of voters in local-government elections.

Pending such events, the court will retain jurisdiction of the action with leave to the plaintiffs, in the event that an appropriate governing body has not been created for Suffolk County within the permitted standards for representation, to apply for further relief. At this time, it cannot be said that the legislature is unaware of the problem nor, in the light of current court pronouncements, can it now be said that it has failed to act.

The motion to dismiss the complaint is denied.

An injunction at this time would serve no useful purpose; accordingly, the application therefor is denied without prejudice to renewal.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

62 Civil 821

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS,
Plaintiffs,

— against —

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR M. CROMARTY, and THOMAS J. HARWOOD, constituting the Board of Supervisors of Suffolk County, New York, *Defendants.*

Before: HON. LEONARD P. MOORE, Circuit Judge; HON. WALTER BRUCHHAUSEN, HON. JOHN F. DOOLING, District Judges.

Upon the complaint, all of the motion papers, papers in opposition thereto, plaintiffs' application for an injunction, defendants' motion to dismiss the complaint, proceedings in open court on September 30, 1963, and hearings on said application and motion, the Statutory Court consisting of Hon. Leonard P. Moore, Circuit Judge, and Walter Bruchhausen and John F. Dooling, Judges of this Court, in an opinion dated and filed February 1, 1965, having concluded the defendants were not entitled to dismissal of the complaint and the plaintiffs were not presently entitled to the injunction relief applied for, such opinion constituting the findings of fact and conclusions of law herein.

IT IS ORDERED AND ADJUDGED

1. The plaintiffs' application for an injunction as prayed for in the complaint is denied without prejudice to renewal in the absence, within a reasonable time, of the political action afforded governmental bodies to be taken as indicated in the Court's decision herein.

2. The defendants' motion to dismiss the complaint is denied.

3. Jurisdiction of further proceedings which may be found to be necessary in this Court is retained.

Dated: Brooklyn, New York
March 3d, 1965

/s/ LEONARD P. MOORE
Circuit Judge

/s/ WALTER BRUCHHAUSEN
District Judge

/s/ JOHN F. DOOLING, JR.
District Judge

APPENDIX B

Decision of Hon Walter Bruchhausen, D.J., filed April 8, 1963

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS, *Plaintiffs*,

v.

EVANS K. GRIFFING ET AL., *Defendants*.

No. 62 C 821.

United States District Court

E. D. New York

April 8, 1963.

BRUCHHAUSEN, District Judge.

The defendants move to dismiss the complaint on the grounds that (1) no substantial federal question is raised; (2) the Court lacks jurisdiction over the subject matter; (3) the complaint fails to state a claim upon which relief can be granted; (4) the Court should abstain from exercising its equitable jurisdiction; and (5) there has been a failure to join an indispensable party.

THE COMPLAINT

[1] The plaintiffs in their various capacities as citizens, taxpayers and voters of Suffolk County, New York, seek (1) judgment pursuant to 28 U.S.C.A. §§ 2201 and 2202 declaring invalid under the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States, so much of Section 203 of the Suffolk County Charter which provides that the defendants, constituting the Board of Supervisors of said County, shall each have one vote as members of the said Board, and (2) an injunction to restrain the defendants from acting in their collective capacity as such Board until a constitutional change in the voting system is duly made and adopted pursuant to applicable law.

[2] Jurisdiction is asserted and relief requested both under the Civil Rights Act, 42 U.S.C.A. §§ 1983, 1988 and 28 U.S.C.A. § 1343(3) (4) Plaintiffs seek the convening of a three-judge court, pursuant to 28 U.S.C.A. § 2281 insofar as an injunction is sought restraining the enforcement or execution of a State statute.

It is alleged that each of the defendants resides in, and represents the voters of, one of the ten towns in Suffolk County; that the population of these towns varies from 1,367 to 191,280; that each defendant casts one vote without regard to the number of persons he represents; that the voting power is distributed solely on a geographic basis, that is one vote per town. It is further alleged that this arrangement arbitrarily exalts the voting strength of persons residing in the less populated towns, with no justification other than the present invidiously discriminatory geographic classification.

In Baker v. Carr, 369 U.S. 186, at page 199, 82 S.Ct. 691, at page 700, 7 L.Ed.2d 663, the Court held in part:

> "Article III, § 2, of the Federal Constitution provides that 'The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *.' It is clear that the cause of action is one which 'arises under' the Federal Constitution. The complaint alleges that the 1901 statute effects an apportionment that deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment. Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit,' Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579, 24 S.Ct. 553, 557, 48 L.Ed. 795, or 'frivolous,' Bell v. Hood, 327 U.S. 678, 683, [66 S.Ct.

773, 776, 90 L.Ed. 939]. That the claim is unsubstantial must be 'very plain.' . Hart v. Keith Vaudeville Exchange, 262 U.S. 271, 274 [43 S.Ct. 540, 541, 67 L.Ed. 977]."

At page 200 of 369 U.S., at page 701 of 82 S.Ct., the Court further held in part:

"Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, § 2, and so within the power of Congress to assign to the jurisdiction of the District Courts. Congress has exercised that power in 28 U.S.C. § 1343(3):

" 'The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person * * * [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *.' "

Mr. Justice Stewart in his concurring opinion at page 265, 82 S.Ct. at page 736 said in part:

"The Court today decides three things and no more: '(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) * * * that the appellants have standing to challenge the Tennessee apportionment statutes.' "

The fifth ground asserted for dismissal is not strongly urged nor is it tenable.

After due and careful evaluation of the allegations of the complaint and consideration of the authorities cited by counsel which were examined and distinguished in Baker

v. Carr, supra, the issues presented are of such a nature as to warrant the convening of a three-judge court. The allegations present a justiciable constitutional cause of action upon which the plaintiffs are entitled to a trial and determination. The right asserted is within the scope of judicial protection under the Fourteenth Amendment.

The motion is denied without prejudice to its renewal before the three-judge court. Settle order on five (5) days' notice, in compliance with 28 U.S.C.A. § 2284.

APPENDIX C

United States Constitution
Article 4, Section 4

SECTION 4. *Republican government*

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

* * * * * * * * * * *

United States Constitution
Fifth Amendment

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * * * * * * *

United States Constitution
Tenth Amendment

AMENDMENT X—RESERVED POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * * * * * * * * * *

United States Constitution
Fourteenth Amendment

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in

insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * * * * * * * * *

APPENDIX D

FEDERAL STATUTES

28 U.S.C. 1253 Supreme Court—Jurisdiction

§ 1253. *Direct appeals from decisions of three-judge courts*

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926.

* * * * * * * * * * *

28 U.S.C. 1343 District Courts—Jurisdiction

§ 1343. *Civil rights and elective franchise*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

* * * * * * * * * *

28 U.S.C. 2201 Declaratory Judgments

§ 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12(p), 72 Stat. 349.

* * * * * * * * * *

28 U.S.C. 2202 Declaratory Judgments—Further Relief

§ 2202. *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

* * * * * * * * * *

28 U.S.C. 2281 Three Judge Courts

§ 2281. *Injunction against enforcement of State statute; three-judge court required*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute

by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

* * * * * * * * * *

42 U.S.C. 1983 Civil Rights

§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

* * * * * * * * * *

42 U.S.C. 1988 Civil Rights

§ 1988. *Proceedings in vindication of civil rights*

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held,

so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. R.S. § 722.

* * * * * * * * * * *

APPENDIX E

New York Constitution

Article 9—Local Governments

§ 1. *Bill of rights for local governments*

Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:

(a) Every local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof. Every local government shall have power to adopt local laws as provided by this article.

(b) All officers of every local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law.

(c) Local governments shall have power to agree, as authorized by act of the legislature, with the federal government, a state or one or more other governments within or without the state, to provide cooperatively, jointly or by contract any facility, service, activity or undertaking which each participating local government has the power to provide separately. Each such local government shall have power to apportion its share of the cost thereof upon such portion of its area as may be authorized by act of the legislature.

(d) No local government or any part of the territory thereof shall be annexed to another until the people, if any, of the territory proposed to be annexed shall have consented thereto by majority vote on a referendum and until the governing board of each local government, the area of which is affected, shall have consented thereto upon the basis of a determination that the annexation is in the

over-all public interest. The consent of the governing board of a county shall be required only where a boundary of the county is affected. On or before July first, nineteen hundred sixty-four, the legislature shall provide, where such consent of a governing board is not granted, for adjudication and determination, on the law and the facts, in a proceeding initiated in the supreme court, of the issue of whether the annexation is in the over-all public interest.

(e) Local governments shall have power to take by eminent domain private property within their boundaries for public use together with excess land or property but no more than is sufficient to provide for apropriate disposition or use of land or property which abuts on that necessary for such public use, and to sell or lease that not devoted to such use. The legislature may authorize and regulate the exercise of the power of eminent domain and excess condemnation by a local government outside its boundaries.

(f) No local government shall be prohibited by the legislature (1) from making a fair return on the value of the property used and useful in its operation of a gas, electric or water public utility service, over and above costs of operation and maintenance and necessary and proper reserves, in addition to an amount equivalent to taxes which such service, if privately owned, would pay to such local government, or (2) from using such profits for payment of refunds to consumers or for any other lawful purpose.

(g) A local government shall have power to apportion its cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature.

(h) (1) Counties, other than those wholly included within city, shall be empowered by general law, or by special law enacted upon county requests pursuant to section two of this article, to adopt, amend or repeal alternative forms of county government provided by the legislature or to prepare, adopt, amend or repeal alternative forms of their own. Any such form of government or any amendment thereof, by act of the legislature or by local law, may trans-

fer one or more functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies or units of government provided, however, that no such form or amendment, except as provided in paragraph (2) of this subdivision, shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside of cities, and in the cities of the county, if any, considered as one unit. Where an alternative form of county government or any amendment thereof, by act of the legislature or by local law, provides for the transfer of any function or duty to or from any village or the abolition of any office, department, agency or unit of government of a village wholly contained in such county, such form or amendment shall not become effective unless it shall also be approved on the referendum by a majority of the votes cast thereon in all the villages so affected considered as one unit.

(2) After the adoption of an alternative form of county government by a county, any amendment thereof by act of the legislature or by local law which abolishes or creates an elective county office, changes the voting or veto power of or the method of removing an elective county officer during his term of office, abolishes, curtails or transfers to another county officer or agency any power of an elective county officer or changes the form or composition of the county legislative body shall be subject to a permissive referendum as provided by the legislature. Adopted by the people Nov. 5, 1963, eff. Jan. 1, 1964.

* * * * * * * * * *

§ 2. Powers and duties of legislature; home rule powers of local governments; statute of local governments

(a) The legislature shall provide for the creation and organization of local governments in such manner as shall

secure to them the rights, powers, privileges and immunities granted to them by this constitution.

(b) Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature:

(1) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article. A power granted in such statute may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year.

(2) Shall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b), except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in his judgment constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.

(3) Shall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.

(c) In addition to powers granted in the statute of local governments or in any other law, (i) every local government shall have power to adopt and amend local laws not

inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the exent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:

(1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees, except that cities and towns shall not have such power with respect to members of the legislative body of the county in their capacities as county officers.

(2) In the case of a city, town or village, the membership and composition of its legislative body.

(3) The transaction of its business.

(4) The incurring of its obligations, except that local laws relating to financing by the issuance of evidences of indebtedness by such local government shall be consistent with laws enacted by the legislature.

(5) The presentation, ascertainment and discharge of claims against it.

(6) The acquisition, care, management and use of its highways, roads, streets, avenues and property.

(7) The acquisition of its transit facilities and the ownership and operation thereof.

(8) The levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature.

(9) The wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or subcontractor performing work, labor or services for it.

(10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.

(d) Except in the case of a transfer of functions under an alternative form of county government, a local government shall not have power to adopt local laws which impair the powers of any other local government.

(e) The rights and powers of local governments specified in this section insofar as applicable to any county within the city of New York shall be vested in such city. Adopted by the people Nov. 5, 1963, eff. Jan. 1, 1964.

§ 3. Existing laws to remain applicable; construction; definitions

(a) Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to:

(1) The maintenance, support or administration of the public school system, as required or provided by article XI of this constitution, or any retirement system pertaining to such public school system,

(2) The courts as required or provided by article VI of this constitution, and

(3) Matters other than the property, affairs or government of a local government.

(b) The provisions of this article shall not affect any existing valid provisions of acts of the legislature or of local legislation and such provisions shall continue in force until repealed, amended, modified or superseded in accordance with the provisions of this constitution.

(c) Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.

(d) Whenever used in this article the following terms shall mean or include:

(1) "General law." A law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.

(2) "Local government." A county, city, town or village.

(3) "People." Persons entitled to vote as provided in section one of article two of this constitution.

(4) "Special law." A law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages. Adopted by the people Nov. 5, 1963, eff. Jan. 1, 1964.

Laws of New York (1958) Chapter 278, Sections 201-208. Suffolk County Charter

1. Article XXII, Section 2210

§ 2210. Petitions for referendum. Whenever in this charter a question is to be submitted to referendum of the electors of the county by petition, such petition shall be verified or authenticated in the manner provided in the election law with respect to designating petitions. All papers severally containing such requests and signed and so verified or authenticated when bound together and offered for filing, shall constitute one petition.

2. Article XXIII, Section 2303

§ 2303. Modification after adoption. This act provides an alternative form of county government for the county of Suffolk in accordance with section two of article nine

of the constitution of this state. Subject to and in accordance with the provisions and requirements of section one and section two of article nine of the constitution of this state, the provisions of this act and the form of county government provided by this act may be supplemented and/or modified by adding thereto, at any time, any provision or provisions which might have been adopted originally herein or by deleting or changing at any time any provision or provisions herein contained or hereafter duly added or modified herein, so as to leave this act in a modified form which could have been adopted originally, and the provisions of this act and the form of county government provided herein as thus modified shall, from and after the time it becomes effective, have the force and effect of, and be deemed to be, an alternative form of county government for the county of Suffolk, and shall continue to be known as and may be cited as "The Suffolk County Charter."

New York Statutes
Laws of New York (1962) Chapter 36A & 58A
Municipal Home Rule Law

SECTION 23. *Local laws subject to mandatory referendum*

1. A local law subject to mandatory referendum as provided in this section or in any other state statute, shall be submitted for the approval of the electors at a general election of state or local government officers in such local government held not less than sixty days after the adoption thereof unless such local law provides for its submission for approval of the electors at a special election or unless, within thirty days after the adoption of such local law, a petition signed, authenticated and subject to certification by the clerk as provided for other petitions in section twenty-four of this chapter is filed with such clerk requesting its submission at a special election. If the local law so provides or if a valid petition is so filed requesting the submission of the local law at a special election, it shall

be submitted at such a special election held in such local government not less than sixty days after the adoption of the local law, the date for which special election shall be fixed by the legislative body. In either case such local law shall become operative as prescribed therein only if approved at such election by the affirmative vote of a majority of the qualified electors of such local government voting upon the proposition.

2. Except as otherwise provided by or under authority of a state statute, a local law shall be subject to mandatory referendum if it:

a. In the case of a city, provides a new charter for such city.

b. In the case of a city, town or village, changes the membership or composition of the legislative body or increases or decreases the number of votes which any member is entitled to cast.

c. Changes the veto power of the elective chief executive officer.

d. Changes the law of succession to the office of the chief executive officer of a county elected on a county-wide basis or if there be none the chairman of the board of supervisors, the mayor of a city or village or the supervisor of a town.

e. Abolishes an elective office, or changes the method of nominating, electing or removing an elective officer, or changes the term of an elective office, or reduces the salary of an elective officer during his term of office.

f. Abolishes, transfers or curtails any power of an elective officer.

g. Creates a new elective office.

h. In the case of a city, changes the boundaries of wards, or other districts, from which members of the county board

of supervisors, chosen as such in such city to represent the city, are elected.

i. Changes a provision of law relating to public utility franchises.

SECTION 24. *Local laws subject to referendum on petition*

1. A local law subject to referendum on petition as provided in this section or in any other state statute, if not also subject to mandatory referendum, shall not take effect until at least forty-five days after its adoption; nor until approved by the affirmative vote of a majority of the qualified electors of the local government voting on a proposition for its approval if within forty-five days after its adoption there be filed with the clerk a petition protesting against such local law, signed and authenticated as herein required by qualified electors of such local government, registered to vote therein at the last preceding general election, in number equal to at least ten per centum of the total number of votes cast for governor at the last gubernatorial election in such local government.

County Law of Suffolk County (1963)

No. 102(2)

2. The board of elections shall cause any such proposition to be submitted to the qualified electors of the county in the manner provided in the election law. The method and manner of submission, preparation and provision of ballots and ballot labels, use of voting machines, qualification of voters, correcting registers, and conducting the election, canvassing the result and making and filing the returns, and all other procedure with reference to the submission of any such proposition, shall be the same as in the case of any other proposition to be submitted to the electors of a county at a general or special election as provided by law. If a majority of the votes cast on any such proposition shall be in the affirmative, the resolution shall be approved. As amended L.1951, c. 652.

No. 153:

§ 153. *Rules of procedure*

1. A power of the county, whether in terms vested in the county or in the board of supervisors shall, except as otherwise expressly provided, be exercised through a local law or resolution duly adopted by the board.

2. A majority of the duly constituted membership of the board of supervisors shall constitute a quorum for the transaction of business, but a less number may adjourn.

3. Each local law or resolution shall have a title prefixed concisely stating the contents.

4. Whenever in this chapter or other general, special or local law, the board of supervisors is authorized or required to act, and no proportion of the voting strength for such action is otherwise prescribed, such action shall be taken by the affirmative vote of a majority of the total membership of the board. A roll call shall be taken and entered by the clerk in the minutes of its proceedings when required by law or upon request of any member of the board.

5. All resolutions shall become effective upon their adoption, or as otherwise provided by this chapter or other law or as specified in the resolution.

6. Subject to the restrictions provided in this chapter or other law, the board of supervisors shall have power to amend, repeal or supersede any local law or resolution theretofore adopted.

No. 154

§ 154. *Committees*

1. The board of supervisors may create standing committees for the purpose of aiding and assisting the board in the transaction of its business. Any local law or resolution creating any such committee shall specify the powers,

duties and number of its members. A member of any standing committee shall serve until the end of the calendar year in which he shall have been selected, unless the board shall have fixed a different period, but in any event not longer than the term for which he shall have been elected as a supervisor.

2. The board may from time to time create special committees. Any resolution creating a special committee shall specify the powers and duties of the committee and the number of its members. Each member of any special committee shall serve for the period specified in such resolution but in any event not longer than the term for which he shall have been elected as a supervisor.

3. Members of all standing and special committees shall be appointed by the chairman of the board from its membership.

4. Vacancies in standing and special committees shall be filled by the chairman of the board from its membership.

5. The board may authorize committees to accept advice and counsel of citizens not members of the board.

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IN THE

Supreme Court of the United States

No. 206

OCTOBER TERM, 1965

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR M. CROMARTY, and THOMAS J. HARWOOD, Constituting the Board of Supervisors of Suffolk County, New York,

Appellants,

v.

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

October Term, 1965

No. 206

EVANS K. GRIFFING, WILLIAM P. BAIN, LESTER M. ALBERTSON, WILLIAM J. LEONARD, STEPHEN F. MESCHUTT, RALPH J. OSGOOD, CHARLES R. DOMINY, ROBERT J. FLYNN, ARTHUR M. CROMARTY, and THOMAS J. HARWOOD, Constituting the Board of Supervisors of Suffolk County, New York,

Appellants,

v.

I. WILLIAM BIANCHI, JR., and QUENTIN B. SAMMIS,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move for dismissal of this appeal on the ground that it is not within the jurisdiction of the Court, because not taken in conformity to statute or the Court's Rules.

Jurisdiction

This action was instituted pursuant to 42 U.S.C. Sections 1983 and 1988; 28 U.S.C. Sections 1343 (3) and 1343 (4); and 28 U.S.C. Sections 2201-2202.

Statement

Appellees sought a judgment declaring unconstitutional under the equal protection clause of the 14th Amendment Section 153 of the County Law of the State of New York and Sections 201-208 of the Charter of Suffolk County, N. Y. (Laws of New York, 1958, c. 278), which statutes embodied a state-wide practice whereby each member of the board of supervisors of each county of New York State* casts one vote regardless of the number of persons whom he represents.

Appellees also sought to enjoin enforcement of these statutes.

Questions Presented

1. Whether appellants have a direct right to appeal to the Court from an order of a three-judge district court which denied appellants' motion to dismiss the complaint; denied without prejudice to renewal appellees' application for an injunction; and retained jurisdiction, where appellees have not appealed from the denial of the injunction.

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* The voting provisions of County Law Section 153 do not apply to counties within New York City or to a small number of other counties which have their own charters and have adopted a different basis of representation. (e.g., for many years, Nassau County has had a weighted vote upon its board of supervisors). The board of supervisors constitutes the legislative body of each county in New York State outside of New York City.

2. In the event that appellants have no direct right of appeal to the Court at this time, whether the Court in dismissing the appeal should allow appellants additional time to appeal to the United States Court of Appeals.

3. Whether this appeal has been taken in conformity to the Revised Rules of the Court, in light of the fact that the transcript of the hearing before the three-judge district court has not been filed.

Statute Involved

28 U.S.C. Section 1253:

> "1253. *Direct Appeals from Decisions of Three-Judge Courts.*
>
> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

ARGUMENT

I

This appeal is not within the jurisdiction of the Court because not taken in conformity to statute.

Although this appeal is taken pursuant to 28 U.S.C. Sec. 1253 (Jurisdictional Statement, pp. 2, 24a), it is not taken in conformity to statute because it is not an appeal from an order "granting or denying . . . an interlocutory or permanent injunction". The order below denied the injunction sought by appellees, but appellees have not ap-

pealed from the denial of their application for an injunction.

As stated in 6 Moore, Federal Practice, ¶ 54.05[4], page 30, footnote 2:

> "Only orders granting or denying an interlocutory or permanent injunction are directly appealable."

In *American Insurance Co.* v. *Lucas,* 314 U. S. 575 (1941), this Court held that the decrees below—

> ". . . are not decrees 'granting or denying' an injunction. Therefore direct appeals to this Court do not lie. § 266 of the Judicial Code, as amended, 28 U.S.C. § 380. See *Public Service Commission* v. *Brashear Lines,* 306 U. S. 204, 207, and *Phillips* v. *United States,* 312 U. S. 246, 248-251. The appeals are dismissed."

The *Brashear* case, *supra,* in directly applicable. There appellees brought suit to restrain enforcement by appellants of a Missouri statute. A temporary restraining order was issued, but after a hearing a three-judge district court denied appellees' request for a permanent injunction, dissolved the restraining order, and dismissed the complaint. A counter-claim interposed by appellants for an accounting of fees due to the state under the same statute was dismissed without prejudice, and the state officials appealed such dismissal. The Court dismissed the appeal, stating, 306 U. S. at 206-207:

> "The appellate jurisdiction of this Court on direct appeal from a final decree by a district court composed of three judges under § 266 of the Judicial Code is strictly limited as follows: 'a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'

The Public Service Commission as the successful party below has no standing to appeal from the decree denying the injunction. *New York Telephone Co.* v. *Maltbie,* 291 U. S. 645; *Lindheimer* v. *Illinois Telephone Co.,* 292 U. S. 151, 176. And as no appeal has been taken to review the decree denying the injunction, this Court is without jurisdiction."

In the present case, the three-judge court (1) denied appellants' motion to dismiss the complaint, (2) denied appellees' application for an injunction, without prejudice to renewal; and (3) retained jurisdiction. Appellants were the successful parties below insofar as the court denied appellees' request for an injunction, and have no standing to appeal from that part of the decree of the district court. And no appeal has been taken by appellees to review the denial of an injunction.

Appellants suggest that § 1253 be "regarded as having created a new legal right to appeal that is not governed by the usually applied principles of appealability . . ." (Jurisdictional Statement, p. 6). This suggestion is novel doctrine, completely unsupported by case precedent or statutory history.

To the contrary, the history of the three-judge statute and the direct appeal statute shows that a direct appeal was intended as a means of expediting final relief to a party aggrieved by the grant or denial of an injunction. Note, The Three-Judge Court Reassessed (1963), 72 Yale L. J. 1646. Note, The Three-Judge District Court: Scope and Procedure Under Section 2281 (1963), 77 Harv. L. Rev. 299; *Smith* v. *Wilson,* 273 U. S. 388 (1927); *Ex Parte Young,* 209 U. S. 123 (1908); *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors & Publishers,* 375 U. S. 39 (1964); *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 88, 92 (1960); *Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317, 321 (1926).

The only other class of cases which Congress deemed sufficiently important to warrant a direct appeal were those in which an act of Congress has been invalidated on constitutional grounds and the United States is a party. 28 U.S.C. § 1252. No comparable provision has been made for cases in which state statutes have been invalidated, in the absence of an injunction.

In short, the direct appeal statute is—

> " not . . . a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States,* 312 U. S. 246, 251 (1940).

Moreover, the policy of Congress, as noted by the Court, has been to sharply limit its direct appeal jurisdiction from decrees of three-judge courts. Thus, in *Moore* v. *Fidelity & Deposit Co., supra,* the Court dismissed the appeal because no request for injunctive relief was pressed upon a three-judge court, although plaintiff could have pressed one. And in *Smith* v. *Wilson,* 273 U. S. 388, 390, the Court observed:

> "The general purpose of the Act of February 13, 1925, was to relieve this court by restricting the right to a review by it."

Congressional intent to restrict the Court's appellate review was also noted in *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co., et al.,* 292 U. S. 386, 391 (1934); *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 88, 94 (1960).

The Court's lack of jurisdiction in the present case has been well established for many years.

II

The Court should not allow appellants additional time to appeal to the United States Court of Appeals.

Citing *Oklahoma Gas & Electric Co., et al.* v. *Oklahoma Packing Co., et al,* 292 U. S. 386 (1934) as the leading case for the proposition that the Court may enter an appropriate order to preserve appellate remedies when an appeal from the district court has been wrongfully taken to the Supreme Court, appellants urge at the conclusion of their Jurisdictional Statement (p. 32) that such an order be made if the Court finds that it is without jurisdiction to hear this appeal.

While the appellees recognize the power of the Court to fashion appropriate relief to preserve the right of appeal from the judgment of a district court, the exercise of such power is not warranted under the present circumstances because—

(a) the question of jurisdiction has been obviously settled by prior decisions;

(b) the dismissal of the appeal does not terminate the litigation; and

(c) no appeal lies to the Court of Appeals at this time.

(a) The question of jurisdiction has been obviously settled by prior decisions.

The Court's attention is respectfully directed to the qualification established in the *Oklahoma Gas* case, *supra,* that such equitable power is only to be employed where the question of jurisdiction is not obviously settled by prior decisions.

> "We might now terminate the litigation by dismissing the appeal without more, and it would be proper to do so had the correct procedure under § 266 been more

definitely settled at the time the appeal to this Court was attempted." (292 U. S. 386, 392)

This qualification has been reaffirmed in many decisions subsequent to the *Oklahoma Gas* case and as recently as last term in the dissenting opinion of Mr. Justice Goldberg in *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors & Publishers,* 375 U. S. 994, 995 (1964), where the rule was restated as follows:

> "The Court has frequently held in cases involving attempted direct appeals from three-judge District Courts to this Court that 'where the question of jurisdiction was not obviously settled by prior decisions', the Court will enter 'an order framed to save appellants their proper remedies.' *Phillips* v. *United States,* 312 U. S. 246, 254, 61 S. Ct. 480, 484, 85 L. Ed. 800. See also *Walling* v. *James V. Reuter, Inc.,* 321 U. S. 671, 676-678, 64 S. Ct. 826, 828-829, 88 L. Ed. 1001."

See also *Rorick* v. *Board of Commissioners,* 307 U. S. 208, 213 (1939); *United States* v. *New York, New Haven & Hartford Railroad Company,* 276 F. 2d 525, 545 (2nd Cir., 1960).

Unless the Court wishes to establish a doctrine of total permissiveness in allowing all appellants the option of first appealing to it from all decisions of three-judge courts, it should dismiss this appeal without granting appellants further relief. This appeal has been improvidently and frivolously taken to the Court under circumstances where the question of the Court's lack of jurisdiction has been obviously settled by prior decisions. If this is not a case for application of the qualifying rule of the *Oklahoma Gas* case, it is difficult to imagine one that would qualify.

The appellants are appealing from a three-judge district court decision which simply denies their motion to dismiss the complaint and retains jurisdiction pending further proceedings. In light of the express language, history and purpose of 28 U.S.C. section 1253 and *Ameri-*

can Insurance Co. v. *Lucas, supra,* and *Public Service Commission* v. *Brashear Lines, supra,* the appellants' contentions (Jurisdictional Statement, pp. 6-7) that (1) section 1253 grants the right to appeal, regardless of whether appellants have been aggrieved or an injunction has been granted; and (2) appellants nonetheless have properly appealed because the denial of the motion to dismiss coupled with the lower court's retention of jurisdiction is "equivalent to the grant of an injunction", are absurd. One suspects that appellants are attempting to make it appear that the question of the Court's jurisdiction has not previously been settled, when in fact that question has long been settled by prior decisions; and that appellants' motive is to make it appear that they have a colorable claim to an order allowing time to appeal to the Court of Appeals, when in fact they have no such claim.

(b) The dismissal of the appeal does not terminate the litigation.

There is another distinction drawn by the Court in the *Oklahoma Gas* case which totally militates against the grant of a savings order in the present case. There the dismissal of the appeal would have terminated the litigation:

> "We might now terminate the litigation by dismissing the appeal without more. . . ." (292 U. S. 386, 392)

Here the dismissal of the appeal will not terminate the litigation but will merely postpone presentation by appellants of their arguments to the Court. If the appellees at some future date renew their application to the Court below for an injunction, and an injunction is granted, all of the arguments now presented by appellants will be preserved for review here.

Under such circumstances no useful purpose would be served by adopting a savings order, and the appellees have found no comparable case which fashions such relief.

(c) No appeal lies to the Court of Appeals at this time.

Should this appeal be dismissed and an appropriate savings order entered, it would be to no avail, for no appeal lies to the Court of Appeals at this time. The appellants frankly admit, (Jurisdictional Statement, p. 6) that

> "Since the legal rationale behind the requirement that an appealable order be a final one is to avoid piecemeal litigation, it follows that the appropriate time to litigate the questions on their merits would be such time as the three-judge District Court is moved again to render a judgment on the merits."

28 U.S.C. section 1291 vests the Court of Appeals with jurisdiction of appeals from all final decisions of the district courts except where a direct appeal may be had in the Supreme Court, and Section 1292 vests the Court of Appeals with jurisdiction of interlocutory appeals only in certain bankruptcy, admiralty and patent cases and from orders granting or denying an injunction.

Moore states that "where the court in a civil suit, whether formerly at law or in equity, merely postpones or defers action by it for the time being", its order is not one granting or denying an injunction. 6 Moore, *op. cit. supra*, Sec. 54.07; pp. 47-48), citing *Mottolese* v. *Peterson*, 172 F. 2d 308 (2nd Cir., 1949); *Republic of China* v. *National City Bank of New York*, 194 F. 2d 170 (2nd Cir., 1952). This contrasts with appellants' claim (Jurisdictional Statement, p. 7), that

> "the Court's failure to grant Appellant's Motion to Dismiss the Complaint was, for all legal purposes, equivalent to the grant of an injunction by that Court."

While certain decisional exceptions have developed to the finality rule, such as the "offshoot rule" and the *Forgay* doctrine" (*Forgay* v. *Conrad*, 6 How. 201, 203-206, 12 L.

Ed. 404, 1848), none seem applicable to the present case. Rather the Court has before it a simple denial of a motion to dismiss coupled with retention of jurisdiction against the possibility that appellees may wish to press their rights at some later date.

In *Catlin* v. *United States,* 324 U. S. 229, 236 (1945), the Court stated:

> "But the denial of a motion to dismiss even when the motion is based upon jurisdictional grounds, is not immediately reviewable. Cf. *Roche* v. *Evaporated Milk Association,* 319 U. S. 21. See also *Dieckmann* v. *United States,* 88 F. 2d 902. Certainly, this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner."

Thus, where a district court simply denies a motion to dismiss (*Catlin* v. *United States, supra*); "merely postpones or defers action by it for the time being" (6 Moore, *op. cit. supra*), and retains "complete control of the cause." (*Beckhardt* v. *National Power & Light Co.,* 164 F. 2d 199, 2nd Cir., 1947), its order is not appealable to the Court of Appeals.

III

The appeal is not taken in conformity to the revised rules of the Court.

This appeal is not taken in conformity to the revised rules of the Court. Rule 13 (1) imposes upon appellants the duty "to docket the case and file the record thereof with the clerk of this court". Appellees are advised by the clerk of the Court that the transcript of the hearing upon the application for an injunction and upon the motion to dismiss, which hearing was held September 30, 1963, has

not been filed. 28 U.S.C. Section 1253 provides for direct appeals from decisions of three-judge courts rendered "after notice and hearing", and the transcript of such hearing is an essential part of the record. Moreover, appellants designated such transcript as a portion of the record to be prepared and transmitted to the Clerk of the Court (Notice of Appeal, Part II, subdivision 10, p. 2). Relying upon this designation by appellants of said transcript, appellees did not thereafter file or serve a cross-designation of additional portions of the record desired to be included, pursuant to Rule 12 of the revised rules of the Court.

CONCLUSION

The appeal should be dismissed. No order granting appellants additional time within which to appeal to the Court of Appeals should be granted.

Respectfully submitted,

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